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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. [redacted] 57.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY,

Petitioner,

vs.

WELLS DICKEY TRUST COMPANY, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ELMER E. ANDERSON, DECEASED,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA.

BRIEF FOR PETITIONER.

DENEGUE, McDERMOTT & STEARNS,
J. A. CONNELL,
J. C. JAMES,
Counsel for Petitioner.

BRUCE SCOTT,
Of Counsel.

V.

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No. 355

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR PETITIONER

B.

REFER TO REPORTS OF THE OPINIONS DELIVERED IN THE COURT BELOW.

Opinion filed May 29, 1924, reported 159 Minn. 417; 199 N. W. 101. (R. 22-31.)

Opinion filed January 29, 1926, reported 166 Minn. 9, 207 N. W. 186. (R. 106-111.)

Memorandum *per curiam* opinion filed February 19, 1926, reported 166 Minn. 83-4, 207 N. W. 188. (R. 112.)

C

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. THE DATE OF THE JUDGMENT OF THE SUPREME COURT OF MINNESOTA TO BE REVIEWED

The opinion of the Supreme Court of Minnesota affirming judgment of the District Court, was filed January 29, 1926 (R. 106), and supplemented by per curiam opinion filed February 19, 1926 (R. 112), although the date of the judgment is February 10, 1926. (R. 110).

2. THE STATUTES CLAIMED TO BE ADVANCED, AND RULINGS MADE IN THE LOWER COURT WHICH ARE RELIED UPON AS A BASIS OF THIS COURT'S JURISDICTION

Respondent's intestate, a railway fireman, was killed in a collision of interstate trains. This suit was brought under the Federal Employers' Liability Act[1] by the administrator of his estate for the benefit of his widow for damages she claimed to have sustained on account of his death.

Section One of the statute provides that in case of death of an employee the carrier shall be liable

> "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then for the benefit of such parents and next of kin dependent upon such employee, etc."

The specific claims advanced by petitioner in the lower court, which are relied upon as a basis of this court's jurisdiction, are

[1] Act of April 22, 1908, ch. 149, Sec. 1, 35 Stat. 65, as amended by Act of April 5, 1910, ch. 143, Sec. 1, 36 Stat. 291, U. S. Comp. Stat. 8657.

First, that the sister had no interest in the cause of action given by the Federal statute, because the *mother* of deceased survived him; that the cause of action created by the statute accrued *upon the death of the employee* for the *sole benefit of his mother*, for *her* loss; that the sister never had any interest in the cause of action for the employee's death and could not acquire a right of action for any loss she might have sustained by her brother's death, by or through the subsequent death of the *mother*, that rights under the statute must accrue *at the time of the death of the employee*, or not at all.

Second, that the sister had no right of action under the statute because she was not "*dependent*" upon her deceased brother.

The rulings made in the lower court which are relied upon as a basis of this Court's jurisdiction, are as follows:

On motion of petitioner (R. 14, 15) the trial court dismissed the suit (R. 15), holding that the time of the employee's death, his mother was the only person for whose benefit an action could be brought under the Federal Employers' Liability Act, and, that as no such action had been brought for her benefit, a suit under the Federal Act, for his death, could not be maintained after her death, for the benefit of a sister who had had no right under the statute at the time of his death. (R. 18.)

From a judgment dismissing the case (R. 14,) the administrator appealed to the Supreme Court of Minnesota, which court, in an opinion filed May 29, 1924, reversed the judgment and held that the administrator might recover for the benefit of a dependent sister, regardless of the survival and subsequent death of the

mother. (R. 22-30, 159 Minn. 419, 199 N. W. 101.) Justice Quinn dissented.

On transcript of this judgment of reversal by the Supreme Court of Minnesota (R. 30) the case was again tried in the District Court of Hennepin County. (R. *et seq.*)

At the opening and close of the evidence in the second trial, petitioner moved for dismissal and directed verdict in its favor, on the ground that under the complaint and admitted facts plaintiff had failed to establish a cause of action, because it appeared that deceased left a mother, a member of the second class of beneficiaries under the Federal Act; that the parties were engaged in interstate commerce and were governed by the Federal Act; that deceased left no widow, father or children; that the mother survived him and the [illegible] action vested in her, and that when she died on May 1921, the cause of action died with her; and on the further ground that plaintiff failed to show any [illegible] within the purview of the Federal Act. (R. 43, 77.) Said motions were denied by the court and petitioner excepted. (R. 44, 77.)

The case was submitted to a jury and their [illegible] verdict for plaintiff.

Petitioner moved to set aside the verdict of the jury and enter judgment in favor of defendant notwithstanding the verdict, because the verdict was not supported by the evidence, was contrary to law and because the court should have granted defendant's motion for a directed verdict in its favor made at the close of all the evidence. (R. 80-81.) The court denied said motion (R. 81), and entered judgment on the verdict, amounting, including interest and costs, to $[illegible]. (R. 82.)

From this judgment petitioner appealed to the Supreme Court of Minnesota, assigning error on both points (R. 104, 77 and 89-90). The court affirmed the judgment in an opinion filed January 29, 1926 (R. 106, 166 Minn. 79, 207 N. W. 186), holding that the evidence of dependency was sufficient under the Federal Act and referring to its former opinion as disposing of the question whether the suit might be maintained for the benefit of the sister. On rehearing, the Supreme Court of Minnesota filed a *per curiam* opinion February 19, 1926, as follows:

> "One ground of the defendant's motion for a directed verdict was that the sister of the decedent was not a beneficiary under the statute, his mother living at his death, but dying before action brought, and that the action could not be maintained; and error is assigned in the denial of such motion and the motion for judgment notwithstanding the verdict.
>
> "The question was considered on the former appeal and is again pressed by the defendant. We hold that the sister was a beneficiary within the federal act, and that there could be a recovery if she was in fact a dependent. So far as we are advised, but one case, *Kerner* v. *Trans Mississippi Terminal R. Co.*, 158 La. 853, 104 So. 740, involving a similar statute, has arisen since. The conclusion there reached is not in harmony with that adopted by us.
>
> "The contention of the defendant has been considered again on this appeal, we adhere to the decision made on the former one, and the judgment is affirmed." (R. 112, 166 Minn. 83-4, 207 N. W. 188).

Thereupon petitioner made due application to this Court for a writ of certiorari to the Supreme Court of Minnesota, which was allowed by this Court June 1, 1926, 271 U. S. 657.

3. STATUTORY PROVISION UNDER WHICH THIS COURT JURISDICTION IS INVOKED.

Sec. 237 (b) of the Judicial Code, as amended February 13, 1925, (c. 229, Sec. 1, 43 Stat. 937; Sec. 344, 9, Title 28, "United States Code," Act of June 26 1926).

4. CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THIS COURT.

Reading Company v. *John L. Koons*, in which the Court granted writ of certiorari to the Supreme Court of Pennsylvania, January 5, 1925 (266 U. S. 600). Decision of this Court reversing the Supreme Court of Pennsylvania on construction of Federal Employers' Liability Act, filed April 12, 1926. (271 U. S. 58).

Minneapolis, St. P. & S. S. M. R. Co. v. *Ernest J. Gotschall*, writ of certiorari to the Supreme Court of the State of Minnesota granted June 9, 1924 (265 U. S. 579). Decision of this Court, affirming judgment of the Supreme Court of Minnesota construing the Federal Employers' Liability Act and the Safety Appliance Act, filed January 4, 1926. (270 U. S. 436).

D.

Statement of the Case.

Elmer E. Anderson, a fireman on petitioner's interstate train, was instantly killed in a collision at Stanton, Iowa, November 1, 1920. (R. 23-9, R. 112.)

Deceased left no widow, child or father, but was survived by his mother, his brother and his sister. (R. 23, 38.)

It is undisputed that on the death of Anderson a cause of action accrued under the Federal Employers' Liability Act, *for the sole benefit of his surviving mother*; that the brother and sister were excluded by the controlling language of the statute.

March 14, 1921, four months after Anderson had been killed, the District Court of Union County, Iowa, where he had lived, where his death occurred, and where his mother and sister resided, appointed the sister administratrix of his estate. (R. 10.) However, no suit was brought by the administratrix, or anyone else, to enforce the cause of action which had accrued for the mother. (R. 34.)

May 5, 1921, six months after Anderson's death, *his mother died*. (R. 10.) Up to the time of her death no action had been brought on the cause of action created by the Federal statute for her benefit. (R. 29, 34.)

December 27, 1921, about fourteen months after Anderson's death and more than seven months after the death of his mother, the Wells Dickey Trust Company of Minneapolis, Minnesota, respondent herein, was appointed by a Minnesota court as "special administrator" of the estate of Elmer E. Anderson, the de-

counsel in man (R. 18.) and as such "special adm
trator" brought this suit in the District Court of He
pin County, Minnesota, under the Federal Emplo
Liability Act, for damages for the death of said A
son, *for the benefit of his sister* (R. 6-10.)

The trial court dismissed the suit (R. 15) on
ground that the mother was the only person for w
benefit an action accrued on the death of Anderso
that this suit could not be maintained, after he d
for the benefit of the sister (R. 18.)

The administrator appealed to the Supreme Cou
Minnesota where the judgment of the trial court w
revised (R. 22 to 30, 139 Minn. 417, 166 N. W. 501.)

The court admitted that its decision was contra
numerous decisions of authority. Justice Q
stated, stating that in his opinion, a surviving dep
relative must acquire rights under the Federal
at the time of the death of the employee, or not
(R. 29, 139 Minn. 423, 166 N. W. 503.)

On transcript of this judgment of reversal to t
preme Court (R. 30) the case was again tr
District Court of Hennepin County (R. 32-37
dence was offered to show that the sister, an ele
woman, about three years of age (R. 44) and
considerable business experience, had supported h
clerical positions in the City of Chicago from
1917, earning twenty-eight dollars ($28.00) per
week (R. 70-76), that in 1917 the mother was
health and in need of care and the brother Em
Anderson, respondent's intestate, had gone to C
and persuaded the sister to return home to take
of her mother and their home, by promising to pa
more money than she could earn in Chicago (R.

The sister testified that pursuant to this agreement she returned to the family home in Iowa, cared for her mother and ran the household, the brother furnishing the money, and that he also paid her fifteen or twenty dollars per week (R. 55,) paid semi-monthly (R. 56,) as compensation for the services rendered her mother and him. (R. 61.) It was conceded that if she had continued working in Chicago he would not have paid her anything. (R. 62.) After the deaths of the mother and brother the sister returned to work in Chicago, where she was employed at the time of the trial. (R. 69.)

Petitioner contended that this bargain made between the brother and sister, for her return home to keep house and care for her aged mother, was no more than a contract, such as might have been made with or by any competent housekeeper, and which his death terminated; that as the sister was an intelligent, able-bodied woman, well able to take care of herself, she was not "*dependent*" upon her brother, within the meaning of the Federal Employers' Liability Act. (R. 77.)

The trial court overruled this contention of petitioner and the motions raising the point (R. 91,) although stating that the question "was not free from doubt." (R. 90.) Throughout the second trial petitioner again objected, by apt motions and exceptions (R. 44, 77, 89-90,) to the maintenance of the suit for the benefit of the sister, because the right of action had vested in Anderson's mother at his death and was not transferred to the sister. Under the decision of the Supreme Court of Minnesota the trial court overruled all such objections and motions of petitioner. (R. 44, 91.) The case was submitted to a jury; there was a verdict for plaintiff and a judgment thereon, amounting, including interest and

costs, to five thousand and eight dollars and ninety-eight cents ($5,008.98). (R. 102.)

From this judgment petitioner appealed to the Supreme Court of Minnesota, assigning error on two points. (R. 104, 77 and 80-90.) The court affirmed the judgment in an opinion filed January 28, 1926. (R. 108; 166 Minn. 79, 207 N. W. 186.) holding that the evidence of dependency was sufficient under the Federal Act and referring to its former opinion as disposing of the question whether the suit might be maintained for the benefit of the sister. On rehearing, the Supreme Court of Minnesota filed a *per curiam* opinion February 19, 1926 (R. 112; 166 Minn. 83-4, 207 N. W. 188) stating that the last mentioned point had been reconsidered but that the court adhered to its former decision that the suit might be maintained for the benefit of the sister, notwithstanding the survival and subsequent death of the mother who had been the sole beneficiary, and the court affirmed the judgment. (R. 112.)

Thereupon petitioner made due application to this Court for a writ of certiorari to the Supreme Court of Minnesota, which was allowed by this Court June 1, 1926, 271 U. S. 657.

It will be observed that we are not concerned with the question whether the right of action which accrued to the mother on the death of Anderson was one which survived to her administrator or heirs, so that they might recover, in an appropriate action, for the pecuniary loss she sustained. No claim is made for the damage sustained by the mother. No claim is made that mother's cause of action was inherited by the sister under any state law of descent.

The question is whether the sister, who admittedly

had no interest in the cause of action when it accrued on the death of the brother, acquired, by reason of the death of her *mother*, a right of action, under the Federal Statute, for damages the sister claimed to have sustained by the death of her *brother*.

E.

Specification of Assigned Errors Intended to Be Urged

1. The Supreme Court of Minnesota erred in holding that this suit might be maintained for the benefit of the sister notwithstanding the fact that the mother of the deceased employee survived him and admittedly was sole beneficiary under the Federal Statute at the time the cause of action accrued.

2. The Supreme Court of Minnesota erred in holding that the evidence, showing a mere contract of employment between plaintiff's intestate and his sister, was sufficient proof of dependency under the Federal Employers' Liability Act.

F

ARGUMENT

I

UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT, ANDERSON'S MOTHER WAS THE ONLY PERSON FOR WHOM A CAUSE OF ACTION ACCRUED AT THE TIME OF HIS DEATH. THE SUIT WAS PROPERLY BROUGHT.

The statute provides:

> "Every common carrier by railroad while engaged in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee." (Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Sec. 51, c. 2, Title 45, "United States Code," Act of June 30, 1926.)

Anderson left no widow, child or father. His mother, the surviving parent, was the sole beneficiary under the statute. His brother and sister were excluded. It is conceded by respondent, and the Supreme Court of Minnesota, that the sister for whom judgment has been given in this case, had no right to or interest in the cause of action for Anderson's death *at the time his death occurred and the cause of action accrued.*

In *St. Louis, San Francisco & Texas Railway Co. v. Seale*, 229 U. S. 156, the suit was brought by the widow and parents of an interstate employee and the

petition stated a case under the state law, which gave the right of action to the surviving husband, wife, children and parents. This Court said, page 162:

> "Two of the plaintiffs, the father and mother in whose favor there was a separate recovery, are not even beneficiaries under the Federal statute, there being a surviving widow."

In *Taylor v. Taylor*, 232 U. S. 363, the widow of a railroad employee killed in interstate commerce accepted a judgment in compromise of suit brought by her as administratrix. Thereafter the father of the deceased employee filed claim for one half the net proceeds of the judgment, under the distribution law of the state. This Court held the right of the widow under the Federal Employers' Liability Act was for herself alone and that the father was excluded.

In *New Orleans & Northeastern Railroad Company et al. v. Harris, Administratrix*, 247 U. S. 367, the Court held that under the Federal Employers' Liability Act, no cause of action accrued for the benefit of a dependent mother, where the deceased employee left a widow, who, although she lived apart from him at the time of his death, was never remarried or divorced. The facts were that, after living with his wife for six months, the deceased fell ill and his wife left him; thereafter her whereabouts were unknown to him; she was alive and there was no proof of divorce. After separation from his wife, deceased had provided a home for his mother, had supported her and he was her sole dependence. In delivering the opinion, Mr. Justice McReynolds said, p. 372:

> "The act makes the widow sole beneficiary when there is no child and only in the absence of both may parents be considered. The deceased left a widow and although they had lived apart no claim is made that rights and liabilities consequent upon marriage

had disappeared under local law. Of course, we do not go beyond the particular facts here disclosed. In the circumstances, proof of the mother's pecuniary loss could not support a recovery."

It is well settled that the action given by the statute is not for the benefit of the estate of the deceased employee. *Louisville & Nashville Railroad Company v. Stewart*, 241 U. S. 261.

II.

A NEW CAUSE OF ACTION IN FAVOR OF THE SISTER COULD NOT ARISE BY THE DEATH OF THE MOTHER. RIGHTS OF BENEFICIARIES MUST ACCRUE AT THE TIME OF THE DEATH OF THE EMPLOYEE, OR NOT AT ALL.

Anderson was killed November 1, 1920; his mother died May 14, 1921; during her lifetime no suit was brought on the cause of action for her benefit. December 27, 1921, respondent was appointed "special administrator" of the estate of Anderson, the deceased employee, and brought this suit, not for the benefit of the mother, but for the benefit of the estate of the mother on account of damages sustained by her prior to her death, and not on the cause of action which had accrued when Anderson was killed, but on another cause of action, for the benefit of the sister, to recover for the loss *she* claimed to have sustained by her brother's death.

1.

THE CAUSE OF ACTION ACCRUED AT THE TIME OF THE EMPLOYEE'S DEATH.

In *Readout Company* v. *Keene, Admr.*, 271 U. S. 58 (April 13, 1926, after decision of this case by the Supreme Court of Minnesota), this Court held that the cause of action for death under the Federal Employers' Liability Act *accrues at the time of the death of the employee.*

2

THE JUDGMENT IN THIS CASE IS ON A DIFFERENT CAUSE OF ACTION FROM THAT WHICH AROSE AT THE DEATH OF THE EMPLOYEE.

The Damages Are Different

In *Chesapeake & Ohio Railway Company* v. *Dixon*, 179 U. S. 131, in defining the term "cause of action" in a suit under the Kentucky statute on death by wrongful act, this Court said, page 139:

> "This cause of action manifestly comprised every fact which plaintiff was obliged to prove in order to obtain judgment, or, conversely, every fact which defendants would have the right to traverse."

This definition was repeated with approval in *Bradford* v. *Southern Railway Company*, 195 U. S. 243, 249. In Vol. 2, Words & Phrases, First Series, page 1015, it is stated that:

> "The elements of a cause of action are: First, the breach of duty owing by one person to another; second, the damage resulting to the other from the breach."

In *Michigan Central Railroad Company* v. *Vreeland*, 227 U. S. 59, at page 68, Justice Lurton said:

> "The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them *financially* by reason of the wrongful death. * * * *It is therefore a liability for the pecuniary damage resulting to those who sue for that only.*" (Italics ours.)

In the same opinion, at page 72, Justice Lurton said:

> "The rule for the measurement of damages would *differ according to the relation between the* parties, plaintiff and the decedent, 'according as the action is brought for the benefit of husband, wife, minor

child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.' Tiffany, Death by Wrongful Act, Secs. 158, 160, 162." (Italics ours.)

In *Taylor* v. *Taylor*, 233 U. S. 363, at 370, the Court said:

"If under Section 1, the cause of action was not derived from the deceased in the sense of a succession from him as said in one of the cited cases, her cause of action was 'one beyond that which the decedent had—one proceeding upon altogether different principles.' It came to her, it is true, on account of his death, but because of her pecuniary interest in his life and the damage she suffered by his death. It was her loss, not that which his father may have suffered. The judgment she recovered was for herself alone. He had no interest in it. Any loss he may have suffered was not and could not have been any part of it, as we have seen.

The Parties in Interest Are Different.

In *Chicago, Rock Island & Pacific Railway Company* v. *Schendel*, 270 U. S. 611, (April 12, 1926, after the decision of the Supreme Court of Minnesota in this case) this Court, reversing the Supreme Court of Minnesota, held that a suit by an *administrator* for the benefit of a widow, under the Federal Employers' Liability Act, was barred by judgment in another action against the *widow*, because the right to be enforced by the administrator under the Federal Act was *the right of the widow and she was the real party in interest.*

The same day, in *Reading Company* v. *Koons*, *supra*, this Court said that the administrator acts only for the benefit of the persons specifically designated in the stat-

In *Stewart v. Baltimore & Ohio Railroad Company*, 168 U. S. 445, the Court held that under the Act of February 17, 1885 (c. 126, 23 Stat. 307), giving a right of action for death by wrongful act in the District of Columbia, the personal representative, having no pecuniary interest in the recovery, was merely a nominal plaintiff.

Atlanta, Knoxville and Northern Railway Company v. Hooper, 92 Fed. 820, was a suit brought by Hooper, administrator of the estate of J. W. Lebow, for the benefit of Mariah Lebow, mother of the deceased. More than one year after the declaration was filed the plaintiff was granted leave to amend so as to state that the suit was brought for the benefit of James Madison Lebow, the father of deceased. The defendant filed a plea setting up the one year statute of limitations. The trial court held that suit was begun by the issuance of summons and that the amendment did not change the parties or nature of the action then brought. From a judgment for plaintiff the defendant appealed. The Circuit Court of Appeals, Sixth Circuit, Judges Taft, Lurton and Severens, held that the amendment changing the beneficiary was subject to the plea of limitations because a suit in behalf of one beneficiary is a different suit from one in behalf of another. The Tennessee statute gave the cause of action for the benefit, first, of the father, and after him to the mother. In delivering the opinion, Judge Taft said, p. 822:

> "The next of kin for whose benefit the suit is brought are the real plaintiffs, and the administrator, through *demurrer lies*, and a necessary party in all cases where there is no widow or child of the deceased, is, nevertheless, but a nominal party, and a mere trustee. *Wells v. Railway Co.*, 88 Tenn. 128, 12 S. W. 428; *Lawrence v. Railroad Co.*, 91 Tenn. 458, 19 S. W. 430; *Railroad Co. v. Rose*, 94 Tenn. 386, 29 S. W. 370. Under sec-

tion 3134, the recovery is not only for the mental and physical suffering of the deceased, his loss of time, and necessary expenses incident to the injury, but it is also for the direct pecuniary injury to the beneficiary on whose behalf the suit is brought, caused by the death complained of. The case of action may, therefore, vary materially in the extent of the recovery, as it is brought for one or another beneficiary. The administrator, except where there is a widow or child, must bring the suit; *but his suit for one beneficiary is a different suit from a suit by him for another. To change the beneficiary, under the statute, changes the suit, the amount of recovery, and states a new and different cause of action.* In the light of this conclusion, the plea of the statute was good against the amendment herein when filed, and should have been sustained." (Italics ours.)

The Federal Statute gave a single cause of action for the death of Anderson. It accrued at the time of his death. His mother was the sole beneficiary. She was the real party in interest and the right, under the statute, to be compensated in damages was *her* right to be compensated for *her* loss.

The judgment in this case is upon a supposed cause of action, which, if it existed, would be entirely different from the cause of action which accrued at the time of Anderson's death; the sister is the real party in interest in this suit and the judgment is for the loss *she* claims to have sustained by reason of her brother's death.

3.

THE SISTER NEVER HAD ANY RIGHT TO DAMAGES IN THIS CASE.

The sister had no interest in the cause of action at the time it accrued. She had no interest in it during the life of her mother. Surely the death of the mother could

not give the sister rights not conferred by the Federal Statute at the time the cause of action accrued. It is not the death of the *mother* which gives a cause of action under the statute; it is the death of the *employee*.

The language of the statute is plain and unambiguous. The Court below has disregarded the controlling words "if none." The cause of action which arose on Anderson's death was not derived from him in the sense of succession; it was a cause of action beyond any which he had. It came to his mother at his death, and on account of his death, but solely because of her pecuniary interest in his life and the damage *she* suffered by his death. It was *her* loss, not that which the sister may have sustained. The absolute vesting of the right in some beneficiary at the time of the death of the employee is apparent from the fact that the damages vary according to the relationship of the beneficiary to the employee and the dependency of the beneficiary. The statute is such that a right of action for the benefit of the sister would have accrued only if there had been no surviving mother. The immediate, final and absolute vesting of the right occurs at the time of the death of the employee; the beneficiaries have a right then or not at all. The statute provides for several possible claimants, but the facts in each case determine which of them is the actual and sole claimant. In this case the right belonged to the mother exclusively and could not be transferred to any other beneficiary either by her death or failure to bring suit. There is no life interest in the mother with remainder over to the sister. One action is granted, not several. When Anderson died his sister had no cause of action and the death of the mother gave her none.

In *Reading Company* v. *Koons, Admr.*, *supra*, this

Court held that the two-year limitation in this statute runs from the date of the death of the employee. What becomes of this limitation if a right of action for a different party in interest and with a different measure of damages, arises on the death of the first beneficiary long after the death of the employee? The limitation, running from the death of the employee, precludes the possibility that the statute creates new causes of action for successive beneficiaries in turn.

Apparently no case exactly like this has arisen under the Federal Employers' Liability Act, but there are a number of authoritative and well reasoned decisions in similar cases under like provisions of state statutes.

A leading case is *Woodward* v. *The Chicago and North Western Railway Company*, 23 Wis. 400. That suit was by an administrator to recover damages, under the Wisconsin statute, for the death of Julia B. Woodward. The Wisconsin statute provided that the amount recovered by an administrator in an action for death by wrongful act "shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors in default of such descendants." Thus the beneficiaries under the Wisconsin law were classified as in the Federal Employers' Liability Act, the only difference being that, in Wisconsin, the first right was in the husband or widow; it none, in the lineal descendants, and, if none, in the lineal ancestors. Under the Wisconsin statute, as under the Federal Act, damages are measured by the pecuniary loss of the beneficiary for whom suit is brought.

The complaint alleged that the deceased was survived

by her husband and child. While the suit was pending the husband died and the administrator sought to continue the action for the benefit of the child. The court held that upon the death of the wife the right of action, by statute, vested solely and exclusively for the benefit of her husband; that he alone was entitled to the amount recovered; that the lineal descendants of deceased had no interest whatever in the action, and that after the death of the husband the action could not be prosecuted for the benefit of the infant child. The court said, p. 403:

"With respect to the persons to be benefited by the money recovered in an action of this nature, the statute of this state differs materially from that of New York, and from the English statute, 27 and 28th Victoria, chapter 93. The New York statute provides, that 'the amount recovered shall be for the exclusive benefit of the widow and next of kin, and shall be distributed in the proportions provided by law in relation to the distribution of personal property left by an intestate.' The English statute declares, 'that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused.' The statute of this state reads as follows: 'And the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors in default of such descendants; and in every action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just in reference to the pecuniary injury resulting from such death to the relations of the deceased specified in this section.' By all the statutes, the action must be brought in the name of the personal representative of the deceased—that is, the executor or administrator. Now, while it is apparent, under the English and New York statutes, that the right of action vests at once for the benefit of each and all of the persons

entitled to receive any part of the money recovered, and may be maintained so long as any one of such persons survives, it is equally apparent by our statute, that it vests only for the benefit of the husband or widow, in case the deceased leaves such surviving relative; and if no such relative survives at the time of the death, the action may be prosecuted for the benefit of the lineal descendants of the deceased; and in default of these, then for the benefit of his or her lineal ancestors. * * *

"In this case, the deceased, who was a married woman, left a husband who survived until some time after this action was commenced. Upon her death, therefore, the right of action, by the statute, vested solely and exclusively for the benefit of her husband. He alone was entitled to the amount to be recovered, and could hold and dispose of the same at pleasure. The lineal descendants and ancestors of the deceased had no interest whatever in the action, and the damages to be recovered could not be estimated with reference to the pecuniary injury, if any, resulting to them, or any of them. The damages must have been given in reference to the pecuniary injury and loss of the husband alone; and such is the obvious interpretation of the words in the last clause 'with reference to the injury resulting from such death to the relatives of the deceased specified in this section' which are to be understood distributively, and not collectively, as counsel seem to suppose. * * *

"The position that the action does not abate because the nominal plaintiff, the administrator, still lives and is ready and willing to prosecute it, seems scarcely worthy of serious thought. The administrator is a mere trustee, so made by the statute, with power to sue for the benefit of his *cestui que trust*, or the person beneficially interested. He has no right except in virtue of the right of the real party in interest, and if the right of that party is lapsed or lost, so that no recovery can be had upon it, it follows that the action can be no longer maintained. As already observed, whether there is a person in being entitled, under the statute, to the money recovered, and whom the administrator represents, is one of the facts in issue, which must be proved be-

> fore any recovery can be had. It appears that the person so entitled died, and that the right of action expired with him; and for that reason, if for no other, the judgment of nonsuit must be affirmed."

Another leading case is *Bean* v. *Louisville & Nashville Railroad Company*, 94 Tenn. 388, 29 S. W. 370, an action by an administrator to recover damages for the death of Frank Murray, plaintiff's intestate, for the benefit of Mary Ann Murray, the surviving widow. The Tennessee statute at that time provided that the right of action for death by wrongful act

> "shall pass to his widow, and in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin."

After trial of the case and appeal to the Supreme Court of Tennessee, the widow, for whose benefit the suit was brought, died. Defendant moved to abate the suit on account of the death of the widow. The plaintiff administrator sought to continue the suit for the benefit of Reganie Murray, father of deceased Frank Murray, and his surviving next of kin. The Supreme Court of Tennessee said, 29 S. W. 371:

> "The question now presented, probably for the first time in this state, is whether, upon the death of the widow, the suit abates, or can the administrator still prosecute it for the benefit of the father, who is the next of kin of plaintiff's intestate? The question, when laid in a narrow compass and reduced to its ultimate analysis, is, whether the right of action survives and is limited to those entitled to the recovery at the death of the deceased, or whether, upon the death of those then entitled, the cause of action survives and reverts to the next of kin in the line of distribution. * * * The widow having died, the question now to be determined is, whether the suit abates, or whether the administrator may still prosecute it for benefit of the father of deceased, who is the next of kin now surviving."

At page 372 the court said:

"We think the exclusive statutory beneficiary was that person or class of persons who were entitled to the recovery *at the death of deceased, when the cause of action accrued.* In this case it was the widow, and, in the language of the statute, the right of action passed to her, or to the administrator, for her benefit. The right of recovery having once vested in the widow, it did not pass upon her death to her personal representative, neither did it revest in the next of kin of deceased, for the reason that no provision is made in the statute for such contingency. The cause of action, upon the death of the person to whom it survived, or for whose benefit it might be prosecuted, was thereby extinguished."

In closing the opinion the court said (page 372):

"Had there been no widow and children at the death of the intestate, the right of action would have passed to the father, or rather to the personal representative, for the benefit of the father, or in the event the deceased left no father surviving him, the suit would be prosecuted for the benefit of the next of kin living at the death of deceased. The right of action, however, does not pass to any person, or survive to any beneficiary, excepting those *appointed in the statute as entitled to the recovery when the cause of action accrued.*" (Italics ours.)

Another important case is *Sanders' Adm'x. v. Louisville and Nashville Railroad Company*, 111 Fed. 708, a ision of the Circuit Court of Appeals, Sixth Cir- t, delivered by Judge Lurton, with whom sat Judges y and Severens. The suit was brought by Kate G. nders, administratrix of the estate of Martin J. Sand , deceased, under the same statute of Tennessee which involved in the case of *Bean v. Louisville and Nash- Railway Company*, last above referred to. The laration averred that at the time of his death Sanders unmarried and without issue, but left surviving him father, his mother, one brother and four sisters. ge Lurton said that, under this state of facts, the ac-

tion could only be brought by the personal representative of the deceased for the use and benefit of the father of the deceased who, under the Tennessee statute of distribution, was the next of kin entitled to the sole benefit of recovery.

While the suit was pending the father died. Thereupon the plaintiff filed an amended declaration averring that prior to his death and before the suit had been brought, the father had sold and transferred his right to the recovery in the case to the plaintiff, in trust for her mother, her brother and sisters. The defendant pleaded in abatement that, as the father alone was entitled to recover damages for the death of plaintiff's intestate, the death of the father extinguished the right of action. The District Court adjudged defendant's plea in abatement good and dismissed the suit. This action of the court was sustained by the Circuit Court of Appeals, which held that the cause of action abated with the death of the beneficiary. In delivering the opinion of the court Judge Lurton said, page 709:

> "The next of kin for whose benefit the right of action survives are the real plaintiffs, and the administrator, though made a necessary party plaintiff by the statute, is nevertheless a mere trustee and a nominal party. *Webb v. Railway Co.*, 88 Tenn. 119, 128, 12 S. W. 428; *Lampe v. Railroad Co.*, and *Railway Co. v. Lilly*, cited above. *Railway Co. v. Hooper*, 25 C. C. A. 24, 26, 92 Fed. 820. . . . *Inasmuch as the right of action survives only for the benefit of the beneficiaries designated in the statute, it is essential that the plaintiff's declaration show that the suit is brought for the use and benefit of a statutory beneficiary in existence when the right of action accrued.*" (Italics ours.)

At page 710 Judge Lurton said:

> "In *Railway Co. v. Hooper*, 25 C. C. A. 24, 92 Fed. 820, we held that, inasmuch as the pecuniary damages recoverable for the loss sustained by the

next of kin for whose benefit the action survives would depend much upon the nearness and dependence of the beneficiary, a suit brought by an administrator for the benefit of one averred to be the next of kin entitled to the recovery was a different cause of action from that stated in an amendment substituting a different beneficiary as the person for whose use the action was brought, and that a plea of the statute of limitations was good against the new action, which would not be good against the action as originally brought."

A case strikingly in point with the one at bar, is *Hammatt Adm'x. v. Lewiston, Augusta & Waterville Street Railway*, 106 Maine 209, 76 Atl. 672, a suit for wrongful death under the statute of Maine, the controlling provisions of which, as quoted by the Supreme Court, p. 673, are as follows:

> "Sec. 10. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of his widow, if no children, and of the children, if no widow, and if both, then of her and them equally, and if neither, of his heirs. • • •"

Plaintiff's intestate, Harold Martin, killed in a crossing accident, was survived by his widow and sister. The widow died before the suit was brought, and recovery was sought for the benefit of the sister, as sole heir at law of Harold Martin. The only question before the court was whether the action could be maintained for the benefit of the sister.

The court said, p. 673:

> "In other words, the plaintiff's position is that the administrator is given a right of action in any event, and the beneficiaries should be determined, not as of the date of the death, but of the recovery. Such a construction cannot be adopted. • • •
>
> "The language of the statute under consideration is plain and unambiguous. Some beneficiary named therein must exist at the time of the death of the de-

ceased, otherwise no right of action arises. The suit is not for the benefit of the estate, and creditors have no interest in it. True, such suit is brought in the name of the administrator, but he is merely the nominal party and acts as trustee. The Legislature could have given the right directly to the widow or children or heirs, had it seen fit to do so, as the Legislatures of some states have done. But if none of the beneficiaries exists at the time of death, no right of action is created. *In re Ives, R. R. Co. v. Tilly*, 90 Tenn. 563, 18 S. W. 243; *Cooper v. State Electric Co.*, 63 N. J. Law, 558, 44 Atl. 633; *Ferguson v. St. Lawrence*, 86 Wis. 526, 57 N. W. 265.

"Under section 10, the party for whose benefit the action is brought depends upon the nature of the family that is left and four different conditions are provided for. * * * But in any event the immediate, absolute, and final vesting of the right occurs at the time of the decease, not at the time of bringing suit or of recovery. The beneficiaries have a right of action then or not at all and the facts of each particular case determine which beneficiaries have the right. If there is a widow as here, she has the sole and exclusive right. It belonged to her immediately upon the death of her husband and could not be transferred to any other beneficiary either by her death or failure to bring suit. The statute provides for several possible claimants, but the facts in each case determine which of them is the actual and sole claimant. There is no life interest in the widow with a remainder over to the heirs at law. One action is granted, not several. When the husband died the sister had no cause of action, and the death of the widow has not given her one. * * *

"Again the cause of action accrues at death by the very terms of the statute. The last clause of section 10 makes the two year limitation within which suit can be brought, begin at that time. Whoever has a cause of action under this statute has two years within which to bring it. Can it be that if a widow is left who survives her husband one year and eleven months, the heirs would then have a right of action but only one month in which to enforce it? The absolute vesting of the right in some beneficiary at time of death is further appar-

out from the fact that the damages vary according to the relationship of the deceased to the beneficiary and the dependence of the latter upon the former. 'The injury for which damages can be recovered must be wholly to the beneficiaries themselves, and it is limited to the pecuniary effect of the death upon them.' *McKee* v. *Dredging Co.* 92 Me. 454, 43 Atl. 29. The pecuniary effect of the death of a husband upon his widow, and therefore the damages recoverable in an action for her benefit would differ materially from the pecuniary effect of his death upon remote heirs at law, and from the damages recoverable by them."

Dilley v. *Cleveland, Cincinnati, Chicago & St. Louis Railway Company*, 34 Ind. App. 52, 72 N. E. 271, was a suit by an administrator under the Indiana statute to recover damages for the death of plaintiff's intestate, who left surviving a widow and three brothers. The widow died while the suit was pending and attempt was made to carry it on for the benefit of the brothers.

The court said, 72 N. E. 273:

"The action must be brought, and must be maintained to the end, by the personal representative of the person for whose wrongful death the damages are sought. He pursues the remedy, not for the benefit of his decedent's estate, but as a convenient trustee specially designated by the statute to recover and distribute the damages for the beneficiaries recognized as such by the statute. Of those there are two classes. First, the widow and children, if there be such persons; and, second, other persons who are next of kin to the person for whose wrongful death the action is maintained. If there be persons entitled to damages of this first class, the damages would be awarded for the exclusive benefit of such persons. Persons of the second class would not be entitled to damages, and there could be no recovery for their benefit, if there were persons entitled of the first class. The right of action accrues upon the death of the intestate. The widow of the appellant's intestate survived him, and there being no children, the right of action existed for her benefit alone, and

there never was any right of action for the benefit of the brothers or 'next of kin' of the intestate."

Since the first decision of the Supreme Court of Minnesota in this case the Supreme Court of Louisiana has construed a statute of that state, in the case of *Kerner et al. v. Trans-Mississippi Terminal Railway Company*, 158 La. 868, 104 So. 740, referred to in the *per curiam* opinion of the Minnesota Court. (R. 112.) The suit was for damages for the death of plaintiff's brother, who was survived by his mother and the plaintiffs in the suit, a brother and five sisters. Under the Louisiana code the mother alone had a prior right of action for damages for his death. She brought suit but died before it was tried. Thereafter the brother and sisters brought suit. The Supreme Court of Louisiana held that such a right of action abated by the death of a person having the first right; that the statute declared that the right of action accrued to brothers and sisters only in cases where there was no surviving spouse or child or parent; that the right of action belonged to the preferred survivors only, to the exclusion of any and all other survivors, and that if one of the survivors, who had thus acquired the right of action, died afterwards, his death did not confer the right of action upon any other survivor; that the right of action was not transmissible from one survivor to another.

The Louisiana court pointed out the difference between statutes like Lord Campbell's Act, giving beneficiaries a joint right of recovery, and statutes where beneficiaries are placed in different classes, one class not being entitled to recover if there are members of a preceding class.

In *Betz v. Kansas City Southern Railway Company*, Mo. , 284 S. W. 455 an opinion filed May 24,

1926, an action was brought by the administrator of the estate of Jenny Baker, deceased, to recover damages for her death in an automobile crossing accident. She was instantly killed while Charles H. Baker, her husband, was so injured in the same accident that he died three hours later. The pertinent part of the Missouri statute on death by wrongful act (Sec. 4217 R. S. Mo. 1919) is as follows:

> "*Fourth*, if there be *no husband*, wife, minor child or minor children, natural born or adopted as *herein otherwise* indicated, or if the deceased be an unmarried minor and there be no father or mother, *then in each case* suit may be instituted and recovery had by the *administrator or executor of the deceased* and the amount recovered shall be distributed according to the laws of descent."

The Supreme Court of Missouri pointed out that plaintiff sought to bring himself within the fourth subdivision of the statute, claiming the right to suit as administrator on the ground that there was no surviving husband, child or children of Jenny Baker. The court said that it was thoroughly established law in Missouri that a party seeking recovery for death by wrongful act must bring himself squarely within the terms of the statute; that plaintiff contended that because the husband was at no time after the death of his wife capable of commencing or authorizing the commencement of a suit for his wife's death, both husband and wife really perished in the same disaster. The court quoted from *Beauvais v. L. & N. R. Co.*, 94 Tenn. 388, 29 S. W. 579, *Hammond v. Lewiston A. & W. St. Ry.*, 106 Maine 209, 76 Atl. 672, and *Woodward v. C. & N. W. Ry. Co.*, 23 Wis. 400, and held that the administrator had no cause of action, same having terminated with the death of the husband.

In *Frazier v. Georgia Railroad & Bank. Company*, 96 Ga. 78, 22 S. E. 930, decided in 1895, the Supreme Court

of Georgia, under a statute providing that "a mother, or if no mother, a father, may recover for the homicide of a child," held that where the mother was living at the time of the death of the minor child, but she died prior to bringing an action, the father of the child could not bring an action for the death of the child.

In *Schmidt* v. *Menasha Woodenware Company*, 99 Wis. 308, 74 N. W. 797, the Wisconsin court held that an action for death by wrongful act abates on the death of the preferred beneficiary.

In *Walton & Company* v. *Burchel*, 121 Tenn. 715, 121 S. W. 391, where a father and son were killed in the same accident it was held a question of fact for the jury whether the father survived the son an appreciable period of time; if he did, no recovery could be had in behalf of the mother for the death of the son, if the father did not survive, then recovery might be had for the mother.

In *Harvey* v. *Baltimore & Ohio Railroad Company*, 70 Md. 319, 17 Atl. 88, under a statute providing that action for death shall be brought in the name of the state for the benefit of the wife, husband, parent or child, it was held that where the husband died pending an action to recover damages in his behalf for death of his wife, the action could not be prosecuted in behalf of the children of deceased.

Walker et al. v. *Warren Construction Co.*, 95 Or. 125, 186 Pac. 13, was an action for death under the Employers' Liability Act of Oregon. Deceased left surviving him his widow, who at the time was insane, and who died three months after he had been killed. The two plaintiffs were his minor children by a former wife. The court held that the Oregon Liability Act gave priority to the

widow if any, and, if none, a right of action to the children, and said:

> "The widow having been invested with a cause of action by the death of her husband, was at liberty to prosecute it or not. If she did, she was under no obligation to divide the proceeds with any of the decedent's other relatives. If she did not prosecute, either in her own proper person or by guardian, her cause of action died with her and did not pass to another, being personal to herself."

In 8 Ruling Case Law, page 769, Section 52, it is said:

> "By the great weight of authority if the beneficiary first entitled to sue fail to bring the action, this will not transfer the right of action to other persons for whose benefit the action might have been maintained if the person first entitled had not been living when the right of action accrued. The reason for this view is that the statutes giving the right of action to specified persons are construed to create a single cause of action, which accrues immediately on the death of the decedent, and exists for the exclusive benefit of the beneficiary in whom the action vests, so that it cannot be transferred to any other beneficiaries by the death or failure of the first beneficiary to sue, since there never was any right of action for their benefit, in the absence of statute providing for such contingency."

In 17 Corpus Juris, p. 1232, section 78, it is said:

> "If a sole beneficiary or all the beneficiaries entitled at the time of decedent's death die, the right of action is extinguished; it does not pass to beneficiaries of the next class who would have been entitled to it if no one of the prior classes had survived the decedent."

It will be noted how frequently in the foregoing cases the courts have referred, in one way or another, to four propositions: *first*, that the right of action *accrues at the time of death*; *second*, that the administrator is but a *nominal party*, acting as trustee; *third*, as said by Justice Lurton in the Sanders case, that those for whose

benefit the right of action is given are the *real plaintiffs*, and, fourth, that the recovery is for the pecuniary loss of the particular beneficiary to whom the right accrues.

Thus the cases holding that, under similar statutes, the right of action accrues at the time of death to the beneficiary then entitled, and to the exclusion of more remote beneficiaries, are in accord with the decisions of this Court as to the character of the rights created by such statutes, the time of their accrual and the persons in whom they vest. (*Reading Company* v. *Koons, Admr.* 271 U. S. 58; *Chicago, Rock Island & Pacific Railway Company* v. *Schendel, Admr.* 270 U. S. 611; *Michigan Central Railroad Company* v. *Vreeland*, 227 U. S. 59; *Taylor* v. *Taylor*, 232 U. S. 363.)

The Supreme Court of Minnesota admits that its decision in this case does not accord with "*the numerical weight of authority.*" (199 N. W. 101, R. 23.) We respectfully submit that it does not accord with sound reason and entirely disregards the meaning and effect of the words "*if none*" in the statute.

The Minnesota court relied upon two cases construing state statutes, *Morris* v. *Spartanburg Railway Gas and Electric Company*, 70 S. C. 279, 49 S. E. 854, and *Garrard* v. *Mahoning Valley Railway Company*, 100 Ohio St. 212, 126 N. E. 53. Neither of these decisions is persuasive that the construction therein given the state statutes in question could be applied to the Federal Employers' Liability Act. In the South Carolina case the court disposed of the question in a short opinion, referring to but one other case, and that its own prior decision. The South Carolina court made the following remarkable statement:

> "The award of damages for the wrongful death is the important matter, the manner of distribution is of secondary consideration."

Of course, the real question is whether the beneficiary for whom the suit is brought has a right of action. The South Carolina court avoided this controlling question under the guise of "liberal construction." The language of the Federal Employers' Liability Act is plain. It is an ancient doctrine in this Court that where the language of a statute presents no ambiguity the court will not attempt to qualify the meaning by construction. (*Doe* v. *Considine*, 6 Wall. 458.)

Another curious feature of the South Carolina case is that although the father of deceased was referred to as the preferred beneficiary, he brought the suit as administrator *for the benefit of all the heirs at law of deceased* and the Court said, in substance, that as all the brothers and sisters were named in the complaint the action should not abate for want of beneficiaries. Apparently this irregularity influenced the decision.

In the Ohio case on which the Minnesota court also relied (*Garrard* v. *Mahoning Valley Railway Company*, 100 Ohio St. 212, 126 N. E. 53), the trial court and the Ohio Court of Appeals had held that the action did not survive the death of the widow for the benefit of the parents, but the Supreme Court of Ohio brushed aside the authorities with the statement that the decisions of other states brought to its attention were of little assistance because they merely construed particular statutes under consideration, and said, in substance, that it proposed to construe the Ohio statute to suit itself. The Ohio court stressed the idea that the cause of action vested in the administrator, and held that therefore it was the intention of the legislature to provide an existing class of beneficiaries who should respond at the time the administrator instituted his suit. The Minnesota court adopted this theory of the Ohio court, stating (R. 26)

that *the Federal Act vests the right of action in the personal representative.*

This view is not in accord with the weight of authority or with the decisions of this Court in the recent cases of *Reading Company* v. *Koons, Admx.*, and *Chicago, Rock Island & Pacific Railway Company* v. *Schendel, Admx.*, hereinabove referred to. In the *Schendel* case this court reversed the Supreme Court of Minnesota on the very question of interest of an administrator under the Federal Act, this Court holding that the administrator is but a nominal party while the beneficiary is the real party in interest.

In the *Koons* case this Court said, p. 62:

> "For while it is true that the executor or administrator is the person authorized to bring the suit, he nevertheless acts only for the benefit of persons specifically designated in the statute."

The *Koons* and *Schendel* cases were decided by this Court April 12, 1926, after the decision of this case by the Supreme Court of Minnesota.

We respectfully submit that Justice Quinn's dissenting opinion in the court below is a correct statement of the law of this case. He said (R. 29, 158 Minn. 423, 198 N. W. 103):

> "I dissent. The act creates but a single cause of action, which vests in the preferred beneficiary immediately upon the death of the employee. In the instant case the mother was the sole beneficiary in the preferred class. She died May 5, 1921, six months subsequent to the death of the employee, without attempting to enforce her cause of action. In my opinion, the cause of action died with her. Under this statute the surviving dependent relative acquires a right of action at the time of the death of the employee or not at all."

III.

THE SUPREME COURT OF MINNESOTA HAS CONSTRUED THE FEDERAL EMPLOYERS' LIABILITY ACT IN THIS CASE AS IF IT CONTAINED SPECIFIC PROVISIONS WHICH WERE PROPOSED IN CONGRESS, BUT REJECTED.

In 25 Ruling Case Law, Title "Statutes," Section 271, it is stated that

> "The rejection by Congress of a specific provision contained in an act as originally reported has been held most persuasive to the conclusion that the act should not be so construed as in effect to include that provision."

In *Pennsylvania Railroad Company* v. *International Coal Mining Company*, 230 U. S. 184, at p. 198, this Court pointed out that a bill as passed by the Senate contained certain provisions which were omitted from the act as finally reported to both Houses and passed, and the Court said that this was not only significant but conclusive.

In *Duplex Printing Press Company* v. *Deering*, 254 U. S. 443, at 474, the Court said that while it was well established that debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to in ascertaining the meaning and purpose of the law making body, nevertheless reports of committees of House or Senate stand upon a more solid footing and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure, and that this has been extended to include explanatory statements in the nature of a supplemental report made by the committee members in charge of a bill in course of passage, citing cases. The Court then referred to the House and

Senate reports as well as remarks of the spokesman of the House Committee, stating that such remarks were the final word of the House Committee on the subject, and uttered under such circumstances and with such impressive emphasis that it was not going too far to say that, except for this exposition of the meaning of the section, it would not have been enacted in the form in which it was reported.

The legislative history of the provision of Section One of the Federal Employers' Liability Act involved in this case, begins with the Act of June 11, 1906, 34 Stat. 232, which was held unconstitutional on other grounds in the *Employers' Liability Cases*, 207 U. S. 463. Although the statute was in other respects invalid, the part in question in this suit was readopted in the Act of April 22, 1908, 35 Stat. 65, which was sustained by the court in *Second Employers' Liability Cases*, 223 U. S. 1. The same language was adopted to the amendment of April 5, 1910, c. 143, Sec. 2, 36 Stat. 291.

The bill which ultimately became the Act of June 11, 1906, originated in the House of Representatives (H. R. 239, 59th Cong., 1st Sess.). As introduced, the bill provided that in case of death of an employee the carrier should be liable "*to his heirs at law.*" However the House Committee on Interstate and Foreign Commerce reported an amendment to the bill striking out the words "*heirs at law*" and inserting in lieu thereof the following:

> "personal representatives, for the benefit of his widow and children, if any, if none, to his next of kin dependent upon him." (House Report No. 2283, 59th Congress, 1st Session, March 15, 1906.)

When this bill was before the House, Representative Driscoll offered an amendment to substitute for the last quoted language, a provision that the personal represen-

ative might maintain an action to recover damages *for the husband or wife and next of kin*" to be "*distributed as unbequeathed assets after payment of all debts and expenses of administration.*" (Vol. 40, pt. 5, Cong. Rec. 59th Cong., 1st Sess., p. 4601.) Mr. Driscoll's amendment was not adopted (Vol. 40, pt. 5, Cong. Rec. 59th Cong., 1st Sess., p. 4601) and the House passed the bill with the amendment reported by the committee, providing for "*the widow and children, if any, if none the next of kin dependent upon him.*" (Vol. 40, pt. 5, Cong. Rec. 59th Cong., 1st Sess., p. 4601.)

While H. R. 239 was under consideration in the House, two bills of like character were introduced in the Senate (S. 156 and S. 1657), each of which provided that a carrier should be liable, in case of death of an employe "*to his heirs at law.*" (Vol. 40, pt. 2, Cong. Rec. 59th Cong., 1st Sess., p. 1747.) When H. R. 239, as amended, had passed the House it was referred to the Senate Committee on Interstate Commerce (Vol. 40, pt. 6, Cong. Rec. 59th Cong., 1st Sess., p. 4633), which took no further action on either Senate bill, but reported the House bill. (Vol. 40, pt. 8, Cong. Rec. 59th Cong., 1st Sess., p. 7075 and Senate Report 3629, 59th Cong. 1st Sess.) Senator LaFollette offered an amendment inserting, after the word "*none*," the words "*then for his parents, if none, then*," so that as amended, the clause read:

> "in case of death, to his personal representative for the benefit of his widow and children, if any; if none, then for his parents; if none, then for his next of kin dependent upon him."

Referring to his amendment (Vol. 40, pt. 8, Cong. Rec. 59th Cong. 1st Sess., p. 7206) Senator LaFollette said:

> "The purpose of this amendment will be at once apparent. In case of recovery for the death of an employe, it makes the parents of the deceased the

> beneficiaries where the employe leaves neither wife nor child. If there be no parents then the next of kin dependent will recover. I am satisfied the fairness of the amendment will commend itself to the Senate."

The amendment was adopted by the Senate, (Vol. 40, pt. 8, Cong. Rec. 59th Cong., 1st Sess., p. 7696) and the bill, as amended, passed. (Vol. 40, pt. 8, Cong. Rec. 59th Cong., 1st Sess., p. 7696.) The House concurred in the Senate amendment (Vol. 40, pt. 8, Cong. Rec. 51st Cong., 1st Sess., p. 7972) and the bill was approved by the President June 11, 1906. (Vol. 40, pt. 9, Cong. Rec. 51st Cong., 1st Sess., p. 8740.)

The bill which became the Federal Employers' Liability Act of April 22, 1908, 35 Stat. 65, originated in the House of Representatives (H. R. 20310, 60th Cong., 1st Sess.) and as reported by the Committee on Judiciary, to which it had been referred, contained the following language:

> "Or, in case of the death of such employe, to his or her personal representative for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe." (Vol. 42, pt. 5, Cong. Rec. 60th Cong., 1st Sess., p. 4836.)

Comparison of the foregoing with the like provision of the Act of June 11, 1906, shows that the two are substantially the same:

Act of June 11, 1906.	Act of April 22, 1908.
"or, in the case of his death	or in case of the death of such employe
to his personal representative	to his or her personal representative
for the benefit of his widow and children, if any;	for the benefit of the surviving widow or husband and children of such employe
if none, then for his parents;	and, if none, then of such employe's parents
if none, then for his next of kin dependent upon him."	and if none, then of the next of kin dependent upon such employe."

H. R. 20310 was accompanied by a Report of the Committee on Judiciary (House Report No. 1386, 60th Cong. 1st Sess.), which contained a summary of many of the state laws on death by wrongful act, showing the varying provisions thereof as to rights of beneficiaries.

H. R. 20310 passed the House without amendment of the clause in question. (Vol. 42, pt. 5, Cong. Rec. 60th Cong., 1st Sess., p. 4439.) In the meantime several such bills had been introduced in the Senate, one of which, S. 5307, was referred to the Committee on Labor. (Vol. 42, pt. 2, Cong. Rec. 60th Cong., 1st Sess., p. 1965.) The Committee submitted Senate Report 460 (60th Cong., 1st Sess.), stating that the bill was so limited as to confine its application to employes engaged in interstate commerce, and stated: "In other respects the measure follows the act passed two years ago." The bill, S. 5307, printed in the Congressional Record (Vol. 42, pt. 5, Cong. Rec. 60th Cong., 1st Sess., p. 4530), contains the same language as to beneficiaries as the House Bill, H. R. 20310.

After debate, the Senate passed the House Bill (Vol. 42, pt. 5, Cong. Rec. 60th Cong., 1st Sess., p. 4551), and it was approved by the President April 22, 1908. (Vol. 42, pt. 6, Cong. Rec. 60th Cong., 1st Sess., p. 5197.)

The bill which became the Act of April 5, 1910, 36 Stat. 291, originated in the House of Representatives. (H. R. 17263.) As introduced, this bill added to the Act of April 22, 1908, provisions as to where suit might be brought and for concurrent jurisdiction of state courts, and added Section 9, providing for survival of an action for damages suffered by an injured employee, to his personal representatives

> "for the benefit of the surviving widow or husband and children of such employe, and, if none, then of such employe's parents, and, if none, then of the

next of kin dependent upon such employee, et
(House Report No. 513, 61st Cong., 2nd Sess., p.

Representative Sterling in charge of the bill sta

"This amendment provides that the action s
survive to the personal representative for the b
fit of the widow or next of kin in the order nam
in the original law." (Vol. 45, pt. 3, Cong. Rec.
Cong., 2nd Sess., p. 2253.)

The House made no change in this language of S
tion 9. When the bill (H. R. 17263) reached the Sen
several amendments were proposed to the provisions
Section 9 regarding beneficiaries. Senator Hale p
posed an amendment reading:

"Such right of action shall survive and may
prosecuted by the next heir or legal representat
of the deceased plaintiff in the order of preced
fixed by the law of the state where the trial ta
place. Any sums recovered and paid in such a
shall be received and distributed in the order p
by law in such state." (Vol. 45, pt. 4, Cong. R
61st Cong., 2nd Sess., p. 4045.)

Senator Heyburn moved to strike out the provis
of Section 9 as to who should be beneficiaries and
amend the section so same would read:

"That any right of action given by this Act
a person suffering injury shall survive to his or
personal representative, to be distributed under
law of the state or territory in which such right
action accrued." (Vol. 45, pt. 4, Cong. Rec.
Cong., 2nd Sess., p. 4048.)

Senator Nelson proposed the following amendmen

"That any right of action given by this Act
a person suffering injury shall survive to his or
personal representative for the benefit of the
tate of the deceased." (Vol. 45, pt. 4, Cong. R
61st Cong., 2nd Sess., p. 4049.)

When Senator Hale called up his amendment, ab
quotes, the following occurred. (Vol. 45, pt. 4, Co
Rec. 61st Cong., 2nd Sess., p. 4063.)

"Senator Burkett. Will the Senator let me

his attention to the first paragraph of the law which provides where this liability shall run? The law as it now is in the first section provides that 'In case of the death of such employe, to his or her personal representative for the benefit of the surviving widow, etc.' Those are the same words that this bill contemplates.

Senator Hale: Undoubtedly.

Senator Burkett: If the Senator's amendment should be adopted would we not have to change the first section of the law?

Senator Hale: If the amendment is agreed to that can very easily be done by an amendment in forma."

Senator Rayner suggested an amendment to Senator Hale's amendment, so as to make same provide:

"That the action shall survive and may be prosecuted as such actions are prosecuted by the law of the state where the trial takes place." (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4122.)

Senator Hale consented to Senator Rayner's amendment as a substitute. The secretary read the amendment, as follows:

"Section 2. That any right of action given by this Act to a person suffering injury shall survive and may be prosecuted as such actions are prosecuted by the laws of the state where the trial takes place. Any sum recovered and paid in such suit shall be received and distributed in the order fixed by law in such state." (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4123.)

Thereupon the following occurred: (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4123):

"Mr. Brandegee: Mr. President, I want to call attention to the fact that if that amendment should prevail, it seems to me it would be in direct conflict with the first section of the bill that we are amending.

Mr. Hale: Mr. President, that has been suggested before; but it will be a very easy thing to adapt the first section to the amendment if it is adopted by the Senate."

Thereupon a vote was taken on a Hale-Rayner amendment, as above quoted, and the amendment was rejected. (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4123.)

Senator Heyburn then offered an amendment to Section 9, striking out everything after the word "representative" down to and including the word "employe", and inserting in lieu thereof the following:

> "to be distributed under the law of the state or territory in which such right of action accrues." (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4123.)

The Senate voted to reject this amendment proposed by Senator Heyburn. (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4124.)

On April 1st the bill, with the same language as to beneficiaries as contained in Section 1 of the Act of April 22, 1908, was passed by the Senate (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4124), and on April 9, 1910, was approved by the President. (Vol. 45, pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4450.)

Thus it appears that the bills introduced in the 59th Congress, which became the Act of June 11, 1906, provided that the recovery for death should go to the *heirs at law*, without restriction as to what relatives should be entitled to priority. The House Committee substituted the priority provisions of the present law. An amendment giving the recovery to the husband and wife or next of kin, to be distributed as unbequeathed assets, was defeated. The Senate bills at the same session, as *introduced*, provided the recovery should go to the *heirs at law* but the Senate Committee adopted the language of the House bill and the Senate adopted Senator La Follette's amendment "*then for his parents, if none then etc.*," in which the House concurred. What could be more persuasive or more conclusive that Congress

did not intend the result reached by the Supreme Court of Minnesota in this Case?

The language of the Act of June 11, 1906, was carried forward into the substantially identical provisions of the Act of April 22, 1908.

The Act of April 5, 1910, adapted the language of Section 1, to the new Section 9, and efforts to amend both sections to provide for *distribution* of the recovery were debated and rejected by the Senate.

In *Fulgham* v. *Midland Valley Railroad Company*, 167 Fed. 660, at 664, in referring to the Federal Employers' Liability Act, the court said:

> "It cannot be that legislation so much discussed in and out of Congress, and which had to be so carefully matured and drawn in order to meet the views of the courts, legislation, too, which inherently shows the skill of the lawyer evidently familiar with the settled principles of the common law, which it modifies in the interest of justice and humanity, is not expressive of the will of Congress, or omits anything which Congress intended to do by it."

IV.

THE INTENTION OF CONGRESS IS MANIFEST FROM THE FACT THAT IT DID NOT ADOPT THE PROVISIONS OF LORD CAMPBELL'S ACT AND THE NUMEROUS STATE STATUTES WHICH GIVE THE CAUSE OF ACTION FOR DEATH FOR THE BENEFIT OF THE WIDOW, HUSBAND, CHILDREN, PARENTS AND NEXT OF KIN, WITHOUT PRIORITY.

Lord Campbell's Act provides that the action:

> "shall be for the benefit of the *wife, husband, parent, and child* of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; *and the amount so recovered, after deducting costs not recovered from the defendant shall be distributed among the aforementioned parties in such shares as the jury by their verdict shall find and direct.*" (9 and 10 Vict. c. 93; Tiffany, Death by Wrongful Act, sec. 21.)

Under Lord Campbell's Act and like statutes of some of the states*, the right of action vests at once for the benefit of all persons entitled to receive any part of the money recovered and may be maintained as long as any one of such persons survives, damages to be apportioned by the jury or under the statutes of descent. (*Woodward v. Chicago & North Western Railway Company*, supra, and *Hammond v. Lewiston, Augusta & Waterville Street Railway*, supra.)

This Court pointed out the distinction between the

* The statutory provisions of all the states are found in "Analytical Table showing in comparative form the leading provisions of the statutes now in force governing actions for personal injuries resulting in death." Pages xix to lxxi, Tiffany, Death by Wrongful Act, 2d Ed.

Federal Act and a state statute like Lord Campbell's Act, in *St. Louis-San Francisco & Texas Railway Company* v. *Seale*, 229 U. S. 156, p. 158:

> "The Texas statute gave the right of action to the 'surviving husband, wife, children and parents' and provided that it might be enforced by all of them or by one or more for the benefit of all, while the Federal statute vested the right of action in the deceased's 'personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next kin dependent upon such employee.'"

In enacting the Federal Employers' Liability Act, it must be assumed that Congress was familiar with Lord Campbell's Act.* The fact that Congress did not adopt Lord Campbell's Act literally, but changed the language relating to beneficiaries, manifests a plain intention of Congress to give effect to whatever change of meaning naturally resulted therefrom. Where a statute is adopted a change in phraseology creates a presumption of a change in intent. *(Crawford* v. *Burke*, 195 U. S. 176, 190.)

Also, it may be assumed that Congress was familiar

*Senator Sutherland: "Let me put into the record a statement of this general subject taken from the Eighth Volume of the American and English Encyclopedia of Law.

"Death by wrongful act. • • • The earliest of the statutes was the English Act of 1846 (9 and 10 Vic. c. 93), commonly known as Lord Campbell's Act. This enactment has served as the model for much of the subsequent legislation on the subject • • • It then conferred a right of action on the personal representatives for the benefit of the wife, husband, parent, and child of deceased. • • • In the United States statutes of like purpose and containing provisions more or less similar have been enacted. There are, however, numerous minor differences. In some the right of action is vested directly in the widow, next of kin, or other beneficiaries. In some, as under Lord Campbell's Act, in the personal representative of the deceased."

(Vol. 45, Pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4096.)

Senator Rayner: "That is exactly the power they have under the English Act. The jury has the power to apportion, and a number of states have taken Lord Campbell's Act in that way." (Vol. 45, Pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4048.)

with the statutes of the different states. Indeed, we need not rely upon mere assumption because the Report of the House Committee on Judiciary, which accompanied the bill adopted as the Federal Employers' Liability Act of April 22, 1908 (House Report No. 1386, 60th Congress, 1st Sess.) contained a summary of many of the state laws giving actions for death by wrongful act.*

Throughout the debates of Congress many references were made by members to the statutory provisions of their own states.**

*This Report refers to state laws giving a right of action for death for the benefit of the "heirs" of deceased (House Report No. 1386, 60th Congress, 1st Sess., p. 32); others for the "widow and heirs" (House Report No. 1386, p. 35); others to the "*personal representative*" (House Report No. 1386, pp. 63, 69); others to "Heirs or *personal representative*" (House Report No. 1386, p. 62). The Report also contains summaries of a number of state laws by which the beneficiaries were restricted to classes, as the Massachusetts statute referred to on page 16, House Report No. 1386, providing priority to the widow or if no widow, to the next of kin dependent; the California statute providing for recovery by the personal representative for the benefit of the widow, children dependent parents and dependent brothers and sisters "*in the order of precedence stated*" (House Report No. 1386, p. 31); the Missouri statute is referred to on page 50 of the same Report as providing an action for death first by the husband or wife of deceased or second, if there be no husband or wife, by the minor child etc. On page 54 of the same House Report reference is made to the Nebraska statute of 1907 giving a cause of action for death to "*the personal representative for the benefit of the widow and children if any, if none then to the parents, if none then to the next of kin dependent*" and on page 55 of the Report is reference to the identical provisions of the Nevada statute. On page 64 of the same Report is reference to the Porto Rico statutes providing for action by "*the widow and children or if there be no such widow or children then by the parents*" and on page 67 of the Report is a summary of the South Dakota statute giving the action "*to the personal representative for the benefit of the widow and children if any, if none, then for the dependent next of kin*."

**Senator Cummins said: "For instance in the state which I come from the action survives in behalf of the administrator of the estate; in the State of Illinois the action survives. I think in behalf of the widow or next of kin." (Vol. 45, Pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4096.)

Senator Sutherland said: "We may say that the right of survivorship shall attach only to the widow; we may say that it shall attach only to the children, or both, or to all of kin. If the Senator will examine the laws of the various states upon this question he will find that they vary greatly. In some of the states the right of survivorship is limited to certain of the kin; the close heirs; in others it is broadened." (Vol. 45, Pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4096.)

Senator Rayner: "In no state for instance, these actions are brought in name of the state of Maryland. * * * We have adopted Lord Campbell's Act." (Vol. 45, Pt. 4, Cong. Rec. 61st Cong., 2nd Sess., p. 4122.)

Some state laws make special provisions for remote beneficiaries, as in Texas the amount recovered is divided among the beneficiaries *who shall be living at the time of distribution.* (*Houston & Texas Central Railway Company* v. *Moore*, 49 Tex. 31.) A Missouri mining statute specifically provides that where the widow dies within the period of limitations, the children may take. (*Pace* v. *Watson*, 92 Mo. App. 89.)

In some states, as Colorado and North Dakota, the statutes create distinct classes of beneficiaries but provide specifically that if the beneficiary of a class entitled does not exercise the right of action within a given time, the next class, after due notice, may be substituted. (*Harshman* v. *Northern Pacific Railway Company*, 14 N. D. 69, 103 N. W. 412; *Hopper* v. *Denver & Rio Grande Railroad Company*, 155 Fed. 273.)

These special statutory provisions giving rights to remote classes of beneficiaries, where there are preferred beneficiaries, emphasize the necessity of such positive enactments.

The fact that Congress did not adopt the language of the statutes of New York, Pennsylvania, Texas or other states which give an action for death for the benefit of all surviving relatives, the proceeds to be distributed according to the laws of descent, indicates that it did not intend such distribution.

Congress did not adopt a statute like Colorado or North Dakota, specifically providing for substitution of a remote beneficiary, if the first beneficiary failed to enforce his or her cause of action.

If Congress had intended such result as has been reached by the Supreme Court of Minnesota in this case, "it would have been easy to have said so," applying the

familiar expression of this court in cases where efforts have been made to change the plain meaning of statutes. (*Tillson* v. *U. S.*, 100 U. S. 43, 46; *Baltimore & Ohio Railroad Company* v. *Grant*, 98 U. S. 398, 403; *United States* v. *Detroit First National Bank*, 234 U. S. 245.)

V.

CONGRESS ADOPTED THE TYPE OF STATUTE CLASSIFYING BENEFICIARIES, WITH PRIORITIES, WHICH HAD BEEN IN FORCE IN MANY STATES LONG PRIOR THERETO. THE AUTHORITATIVE CONSTRUCTION THEREOF BY THE STATE COURTS IS PRESUMED TO HAVE BEEN ADOPTED WITH THE STATUTE.

Statutes on death by wrongful act with priority classification of beneficiaries, like Congress adopted in the Federal Employers' Liability Act, had been in effect many years prior to the passage of that act, and had been construed in well reasoned opinions. The leading case of *Woodward* v. *Chicago & North Western Railway Company*, 23 Wis. 400, above referred to, was decided in 1868.

It is significant that the words "*then for his parents; if none,*" (then for his next of kin, etc.), which gave the right of action in this case to the mother and excluded the sister, were inserted in the Act by amendment introduced by a Senator from Wisconsin, who was an able lawyer and certainly familiar with the death statute of his own state and the construction thereof by the Supreme Court of Wisconsin. (Senator La Follette's Amendment, Vol. 40, Pt. 8, Cong. Rec. 59th Cong., 1st Sess., p. 7696, hereinabove referred to, page 39). *Bean* v. *Louisville & Nashville Railroad Company*, 94 Tenn. 388, 29 S. W. 370, was decided in 1895. Justice Lurton's opinion in *Sanders, Admr.* v. *Louisville & Nashville Railroad Company*, 111 Fed. 708, was in 1901. The Indiana case, *Dillier* v. *Cleveland, Cincinnati, Chicago & St. Louis Railway Company*, 72 N. E. 271, was decided in 1904.

At the time the first Federal Employes' Liability Act was passed in 1906, it was settled by the great weight

of authority,* that if a statute creates distinct classes of beneficiaries, remote beneficiaries have no interest after the death of a preferred beneficiary for whose benefit the cause of action has accrued at the death of the injured person.

Congress had authoritative construction of the language which it selected for the Employers' Liability Act.

Congress having adopted the form of statute creating classes of beneficiaries, we respectfully submit that the authoritative construction of such statutes in the states where same had been in force for many years ought to be applied to the Act of Congress.

In *Jennings* v. *Alaska Treadwell Gold Mining Company*, 170 Fed. 146, the Circuit Court of Appeals, Ninth Circuit, pointed out that in enacting Sec. 353 of the Alaska Code (31 Stat. 392) giving an action for death by wrongful act, Congress adopted substantially Sec. 34 of the Oregon Code; that two years before the adoption of the Alaska Code by Congress the like section of the Oregon Code had been construed by the Supreme Court of Oregon, and the Circuit Court of Appeals applied the construction of the Oregon statute, by the Oregon court, to the section of the Alaska Code, under the rule that such construction was presumed to have been adopted with the statute, citing a large number of authorities.

It is a familiar rule that where a state statute is literally or substantially adopted by Congress, the judicial construction already placed upon it by the courts of the state where it originated accompanies the statute and is to be treated as incorporated therein. (*Capital Traction Company* v. *Hof*, 174 U. S. 1, 36; *Wallis* v. *Eastern Trust Company*, 169 U. S. 295; *Metropolitan Railroad Company* v. *Moore*, 121 U. S. 558.)

*At that time the only decision to the contrary was *Morris* v. *Spartanburg Railway, Gas & Electric Company*, 70 S. Car. 270, 49 S. E. 854 (Nov. 21, 1904), hereinafter discussed, p. 34

VI.

THE EVIDENCE DID NOT ESTABLISH DEPENDENCY ESSENTIAL TO A CAUSE OF ACTION FOR THE BENEFIT OF A SISTER UNDER THE FEDERAL ACT.

This judgment is in favor of a sister claiming as a beneficiary of the third class, "next of kin, dependent upon such employee." Widows, children and parents—beneficiaries of the first and second classes—need show only "some reasonable expectation of pecuniary assistance or support of which they have been deprived," (*Michigan Central Railroad Company* v. *Vreeland*, 227 U. S. 59) but to establish a right of action for a sister, *actual dependency* must be shown (*Garrett* v. *Louisville & Nashville Railroad Company*, 197 Fed. 715, 719, 722; *Moffett* v. *Baltimore & Ohio Railroad Company*, 220 Fed. 39).

In this case there is no claim of want or necessity on the part of the sister. She is an intelligent, ablebodied woman, of mature years, mentally and physically able to take care of herself. For six years she had done so, working in clerical positions in Chicago. After the death of the mother and brother, the sister returned to work in Chicago where she was working at the time of trial. She was not thrown upon the suport of her brother by necessity or misfortune, but in 1917 merely changed her employment. Apparently the deceased brother had assumed full responsibility for the care of the aged and invalid mother, living in her home but keeping it up and supporting her out of his earnings. He needed a housekeeper; the mother needed care. The brother went to Chicago and by promising the sister "more money than she could earn in Chicago", induced her to give up her position in Chicago and take the job of housekeeping for

him. Of course natural affection and sympathy for her infirm mother must have influenced her to some extent, but has nothing to do with the question of dependency on her brother. What she did for her brother was compensated for in money. He had never given her any money prior to the time she went back to Iowa to keep house for him and if she had stayed in Chicago he would not have given her anything. The payments were made regularly, twice a month. She was dependent on her brother only in the sense that any employee is dependent upon the employer while the relation continues. Her arrangement with her brother was terminated by his death and was not of a character which constitutes a legal basis for a cause of action under the Federal Employer's Liability Act. The trial judge said that the question was not free from doubt (R., 100), although he did not feel warranted, under the Minnesota practice, in setting aside the verdict.

In *Ducall* v. *Hunt*, 34 Fla. 85, 15 So. 876, the court said:

> "We think that when the suit is brought by a person who bases his right to recover upon the fact that he is dependent upon the deceased for support, then he must show, regardless of any ties of relationship or strict legal right to such support, that he or she was, either from the disability of age, or non-age, physical or mental incapacity, coupled with a lack of property means, dependent in fact upon the deceased for a support. There must be, when adults claim such dependency, an actual inability to support themselves, and an actual dependence upon someone else for support, coupled with the reasonable expectation of support, or with some reasonable claim to support from the deceased."

In *Southern Railway Company* v. *Vessel*, 192 Ala. 440, 68 So. 336, it was held, under the Federal Employer's Liability Act, that a married sister of a deceased employee was not dependent, merely because she had a moral

claim upon deceased or because he had been paying her regularly for his board.

Hodnett v. Boston & Albany Railroad Company, 156 Mass. 86, 30 N. E. 224, was a suit by a sister, under the death statute of Massachusetts, for damages resulting from her brother's death. The Court held that the evidence did not establish dependency necessary to maintain the action, and said:

> "On the question of dependency, the only evidence was the testimony of the plaintiff herself that she was his half-sister, and had two children; that he used to come in and see her, and sometimes gave her money; that he sent her money every other week or so to pay her rent; *that she had no other means of support but her earnings, and since his death had had to support herself.* There was nothing to show what her earnings or her expenses of living were, or that she was in fact dependent upon his wages for support." (Italics ours.)

In *Bertle v. Northern Pacific Railway Company*, 60 Wash. 552, 111 Pac. 788, in passing on a claim by parents for the death of an adult son, under a statute conferring a right of action only on those dependent upon deceased, the court said:

> "Nevertheless, there must be some degree of dependency, some substantial dependency, *a necessitous want on the part of the parent, and a recognition of that necessity on the part of the child.* Such, we believe to be the general interpretation of like statutes. * * *
>
> "The evidence here does not bring respondents within the statute. They were in no sense dependent upon the deceased for support. The father was able to follow a daily vocation, and if his earnings only resulted in an average income of $40 per month, that was the result of his inability to sell more goods, and not his inability to solicit the sale. His necessity must not be judged from his unsuccessful effort to make a larger income, but from his physical ability to make the effort. Neither does an occa-

> sional contribution from a son to a parent estab
> lish a condition of dependency. There must be
> substantial need on one side and a substantia
> financial recognition of that need on the other sid
> to make out a dependency within the meaning of thi
> statute."

Evidence of contributions, where there is no evidenc
of actual necessity on the part of the beneficiary
where the evidence tends to show that the beneficiar
was not actually dependent upon the deceased, does no
show dependency within the statute. (*Trammell* v. *South
ern Railway Company*, 182 Fed. 789; *Southern Railway
Company* v. *Vessell*, 192 Ala. 440, 68 So. 336; *Atlanti
Coast Line Railway Company* v. *McDonald*, 155 Ga. 63
70 S. E. 249; *Georgia Railroad & Banking Company*
Spanks, 111 Ga. 371, 36 S. E. 855; *Bostic* v. *Northe
Pacific Railway Company*, *supra*.)

In *Illinois Central Railroad Company* v. *Doherty'
Admr.*, 153 Ky. 363, 155 S. W. 1119, an action by an ad
ministrator under the Federal Employer's Liability Ac
for the benefit of brothers and sisters of deceased, th
evidence disclosed that deceased left surviving him sev
eral brothers and two sisters, one a Sister of Charity
residing in a convent, who received no support from th
decedent in his lifetime, and the other sister marrie
and living in Ireland. There was some testimony tha
the decedent had borrowed money to send to his sister
Ireland, but whether the money was sent her in payme
of a debt or for her support was not disclosed. *No ev
dence was introduced to show that the husband in Irela
was unable to support his wife.* There was no evidenc
that any of the brothers were dependent upon the d
ceased. The court held there could be no recovery und
the Federal Act.

The wording of the statute is significant. The wor
"*dependent*" is not used in the clauses giving a right

action to the widow, children or parents; only in dealing with collateral relatives did Congress condition the right of recovery upon their being "*dependent upon such employee.*" The plain purpose of the statute was to provide that collateral relatives who had found it necessary to rely upon the deceased employee for support, should not be left *in want*. Clearly an adult sister claiming under this section must show actual inability to support herself. The statute does not contemplate that interstate carriers should pay damages to adult, collateral relatives of deceased employees, if such relatives are able to take care of themselves and have done so, both before and after the death of the employee.

We respectfully submit that the judgment of the Supreme Court of the State of Minnesota should be reversed.

Respectfully submitted,

Counsel for Petitioner.

Of Counsel.